

STATE OF MICHIGAN
COURT OF APPEALS

JOSEPH KRYGOSKI,

Plaintiff-Appellant,

v

THOMAS KUBER and K&K WAREHOUSING,

Defendants-Appellees.

UNPUBLISHED

September 13, 2005

No. 260840

Menominee Circuit Court

LC No. 04-010798-CZ

Before: Cooper, P.J., and Bandstra and Kelly, JJ.

PER CURIAM.

In this dispute between former partners of defendant K&K Warehousing (K&K), plaintiff appeals as of right from the trial court order granting summary disposition in favor of K&K and plaintiff's former partner, Thomas Kuber, pursuant to MCR 2.116(C)(10), based on the statute of limitations. We affirm.

In 1985, plaintiff and Kuber entered into a partnership agreement for the purpose of constructing a warehouse and to operate their business as K&K Warehousing. It is undisputed that the warehouse was constructed and that the partnership's source of income was derived from tenants who leased space within the warehouse. Although the partnership agreement required the consent of both partners for partnership business, in practice Kuber acted as the managing partner.

In September 1994, the parties entered into a purchase agreement for Kuber to purchase plaintiff's interest in K&K, as well as common stock in a separate entity, for a total purchase price of \$2,450,000. The closing took place on February 27, 1995, with the parties executing a partnership interest redemption agreement and a stock and partnership interest purchase agreement, which superceded the prior agreement.

Similar to the September 1994 purchase agreement, the February 1995 stock and partnership agreement required that plaintiff, on request, execute a subordination agreement for certain items, including the rights of Great Lakes Pulp and Fibre, Inc. (GLPF), or Great Lakes Pulp Partners I., L.P. (Great Lakes Partners), pursuant to any lease of property from K&K. Although there was no lease agreement in place when the September 1994 purchase agreement was executed, documents establishing a lease agreement between K&K and Great Lakes Partners, which purported to contain the signatures of both Kuber and plaintiff, were executed in October 1994 and December 1994, before the February 1995 closing. After the closing, the lease

arrangement was consummated and a conveyor system was installed to connect K&K's warehouse to a plant that was constructed for the lessee's business.

On January 14, 2004, plaintiff filed this action against Kuber and K&K, alleging that he sold his partnership interest to Kuber in 1994 without knowledge that Kuber, on behalf of K&K, had entered into the lease with Great Lakes Partners and that he would not have agreed to the sales price or accepted payment if he had known about the lease. Plaintiff sought monetary damages from Kuber and K&K based on Kuber's alleged fraudulent inducement, silent fraud, negligent misrepresentation, and breach of fiduciary duty.

In March 2004, defendants moved for summary disposition under MCL 2.116(C)(7) and (10), alleging that plaintiff's action was governed by the six-year statute of limitations pursuant to MCL 600.5813 and MCL 600.5827, and was untimely. Plaintiff opposed the motion, asserting that the statute of limitations was tolled because of defendants' fraudulent concealment, MCL 600.5855, that defendants were equitably estopped from asserting a statute of limitations defense, and that defendants' motion was premature because discovery was not complete. After further discovery, the parties filed supplemental briefs and proofs in support of their respective positions. The trial court thereafter granted defendants' motion under MCR 2.116(C)(10), based on the statute of limitations.

We review de novo a trial court's decision on a motion for summary disposition. *Bryant v Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411, 419; 684 NW2d 864 (2004). Although the trial court stated that it was granting defendants' motion under MCR 2.116(C)(10), the proper subrule to apply when reviewing a motion based on the statute of limitations is MCR 2.116(C)(7). An appellate court will review the trial court's decision under the correct subrule. *Spiek v Dep't of Transportation*, 456 Mich 331, 338 n 9; 572 NW2d 201 (1998). Therefore, we review the trial court's decision under MCR 2.116(C)(7).

In deciding a motion under MCR 2.116(C)(7), a court considers all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict it. *Bryant, supra* at 419; see also MCR 2.116(G)(5). The documents may only be considered to the extent that their content or substance would be admissible as evidence. MCR 2.116(G)(6). "If the pleadings or other documentary evidence reveal no genuine issues of material fact, the court must decide as a matter of law whether the claim is statutorily barred." *Holmes v Michigan Capital Medical Ctr*, 242 Mich App 703, 706; 620 NW2d 319 (2000).

Plaintiff does not challenge the trial court's determination that this action is governed by a six-year limitation period and that it was commenced more than six years after his cause of action accrued. He argues, however, that the trial court erred in finding that there was no genuine issue of material fact with respect to whether the statute of limitations was tolled pursuant to MCL 600.5855, because defendant Kuber fraudulently concealed the existence of a cause of action.

The pertinent inquiry under MCL 600.5855 is whether the defendant fraudulently concealed the existence of a claim. Fraudulent concealment involves the "employment of artifice, planned to prevent inquiry or escape investigation, and mislead or hinder acquirement of information disclosing a right of action." *Doe v Roman Catholic Archbishop of the Archdiocese*

of Detroit, 264 Mich App 632, 642; 692 NW2d 398 (2004), lv pending (citations omitted). The statute of limitations is tolled if a party conceals the fact that the plaintiff has a cause of action. *Sills v Oakland General Hosp*, 220 Mich App 303, 310; 559 NW2d 348 (1996).

In general, the acts relied on by the plaintiff must be of an affirmative character and fraudulent. *Doe, supra* at 642. An exception to the requirement of an affirmative act or misrepresentation exists if the parties have a fiduciary relationship giving rise to an affirmative duty of disclosure. *Bradley v The Gleason Works*, 175 Mich App 459, 462; 438 NW2d 330 (1989); see also *The Meyer & Anna Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 45-46 n 2; 698 NW2d 900 (2005), lv pending; *Brownell v Garber*, 199 Mich App 519, 527-528; 503 NW2d 81 (1993).

Here, plaintiff does not allege that Kuber employed an artifice to prevent plaintiff from discovering a potential fraud action. To the extent that plaintiff suggests that Kuber had a duty to disclose information about the Great Lakes Partners lease beyond disclosing the possibility of a lease in the September 1994 purchase agreement or the February 1995 stock and purchase agreement, we note that under Michigan's Uniform Partnership Act, MCL 449.20, a general partner, such as Kuber, has a duty to "render on demand true and full information of all things affecting the partnership" This duty is broadly construed to require disclosure of all known information that is significant and material to the partnership's affairs or property. *Band v Livonia Assoc*, 176 Mich App 95, 113; 439 NW2d 285 (1989).

Viewed in a light most favorable to plaintiff, the submitted evidence indicates that plaintiff did not demand information about any prospective or existing lease with Great Lakes Partners, notwithstanding the disclosure of a possible lease in the purchase agreement documents. Further, the undisputed evidence established that the Great Lakes Partners lease documents were recorded with the county register of deeds, that plaintiff was aware that K&K had the potential of obtaining a beneficial lease involving GLPF, even before he signed the September 1994 purchase agreement, and that plaintiff was in a position to see the construction activities in 1995, which were carried out pursuant to the lease arrangement, notwithstanding his sale of his partnership interest to Kuber. Although plaintiff might not have known the full extent of the possible benefits to K&K arising from the lease, or the possible effect on the value of K&K, he could have demanded information to weigh those issues, but did not.

Further, we are not persuaded that the evidence regarding Kuber's own relationship with GLPF or Great Lakes Partners, or the questions raised by plaintiff with respect to his purported signature on various documents, created a genuine issue of material fact that would preclude summary disposition. Because neither the pleadings nor any substantively admissible evidence revealed a genuine issue of material fact concerning whether Kuber fraudulently concealed a cause of action, the trial court correctly granted summary disposition in favor of defendants on this issue.

In light of our conclusion, it is unnecessary to consider plaintiff's additional claim that there is a genuine issue of material fact whether he discovered or should have discovered the existence of his claims more than two years before he filed his complaint, pursuant to MCL 600.5855. But if this issue is considered, we would resolve it against plaintiff.

Objectively viewed, the September 1994 purchase agreement should have alerted plaintiff to the possibility that a lease existed or might exist in the future with GLPF or Great Lakes Partners. Even assuming that Kuber's fiduciary duties required him to disclose information about any lease anticipated at that time, even without a specific demand by plaintiff, once the partnership ended in February 1995, it would not be reasonable for plaintiff to relax his vigilance and rely on Kuber to make a disclosure. The fiduciary obligation between partners generally remains until the relationship is terminated and the partnership affairs wound up. 59A Am Jur 2d, Partnership, § 294, p 397.

The undisputed evidence that plaintiff knew about the construction to install the conveyor system, which began in 1995, should have alerted plaintiff that the relationship between K&K and GLPF or Great Lakes Partners was different in kind than with other tenants. At a minimum, the undisputed facts known to plaintiff should have raised suspicions whether a beneficial lease that could affect the value of K&K was anticipated when he agreed to sell his partnership interest to Kuber. The necessity for an investigation was apparent under an objective standard. *Heap v Heap*, 258 Mich 250, 263; 242 NW 252 (1932); *Prentis Foundation*, *supra* at 45-46 n 2.

Therefore, viewing the evidence in a light most favorable to plaintiff, the trial court correctly found no genuine issue of material fact with regard to whether plaintiff should have discovered any alleged fraud more than two years before he filed his complaint. Because plaintiff should have discovered any alleged fraud before 1997, we need not consider whether the evidence regarding GLPF's bankruptcy proceeding also supported the trial court's grant of summary disposition on this issue.

We deem plaintiff's third issue, based on the doctrine of equitable estoppel, abandoned because plaintiff did not follow through with this claim in his post-discovery supplemental response to defendants' motion for summary disposition. Cf. *People v Riley*, 88 Mich App 727, 731; 279 NW2d 303 (1979) (party's failure to follow through on motion and request an answer from the trial court constituted abandonment). Regardless, plaintiff did not establish factual support for his claim of equitable estoppel. In general, equitable estoppel may assist a party in an action by precluding the other party from asserting or denying the existence of a particular fact. *Lakeside Oakland Development, LC v H & J Beef Co*, 249 Mich App 517, 527; 644 NW2d 765 (2002). Although the doctrine may be introduced to counter a statute of limitations defense, the evidence here did not support a reasonable inference that Kuber intentionally or negligently engaged in conduct designed to induce plaintiff to refrain from bringing an action within the statutory time period. *Lothian v City of Detroit*, 414 Mich 160, 179; 324 NW2d 9 (1982); see also *Lumber Village, Inc v Siegler*, 135 Mich App 685, 696-699; 355 NW2d 654 (1984).

We affirm.

/s/ Jessica R. Cooper
/s/ Richard A. Bandstra
/s/ Kirsten Frank Kelly